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April 30, 2004

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Re: Notice of Proposed Rulemaking (NPRM), Rules and Regulations Implementing  
the Controlling the Assault of Non-Solicited Pornography and Marketing Act  
of 2003; CG Docket No. 04-53  
Comments of the States Regarding Mobile Service Commercial Message Rules

Dear Ms. Dortch:

Pursuant to the Notice of Proposed Rulemaking (NPRM), published on March 31, 2004, regarding implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act), we, the undersigned Attorneys General, submit the following comments.

The States urge the Commission to protect consumers from the invasive and cost-shifting intrusion of unsolicited mobile service commercial messages (MSCMs). Unsolicited commercial electronic mail messages to mobile telephones bring with them not only the problems inherent in "spam" sent to computers -- the use of computer resources, the sending of pornographic material, the use of deceptive transmission information, and misleading subject lines -- but the added burden of shouldering the cost of receipt. Recognizing the particular issues associated with telephone "spam," Congress required that MSCM senders obtain express authorization from potential recipients before a message can be sent. This is in contrast to computer-viewed commercial electronic mail messages under the CAN SPAM Act, which can be sent without first obtaining permission from the recipient.

The States' comments are focused on an interpretation which gives meaning to clear Congressional intent: to assure meaningful protection of MSCM recipients. Consumers should not be charged to receive or avoid unwanted MSCMs. Consumers who choose to receive MSCMs should do so only if they have given clear assent after appropriate notice, and an opportunity to opt-out of receiving them at a later time.

The States have a significant interest not only in protecting the consumer public, but also in assuring that the regulations promulgated by the FCC will withstand legal challenges. The States are given enforcement authority under the CAN SPAM Act and have a strong interest in assuring that the FCC's interpretation of it is consistent with existing bodies of law.

**I. Consumers Should Be Required to Opt-In, on a Sender-by-Sender Basis, in order to Receive MSCMs.**

In paragraphs 21 and 22 of the NPRM, the Commission seeks comment on how to interpret the directive contained in Section 14(b)(1) of the CAN SPAM Act to "...provide subscribers to commercial mobile services the ability to avoid receiving mobile service commercial messages unless the subscriber has provided express prior authorization to the sender..." The Commission suggests two possible interpretations: opt-in or opt-out.

Under the opt-in approach, MSCMs would be prohibited unless the recipient had granted his or her express prior authorization to a particular sender. Under the opt-out approach, all consumers are presumed to have consented to receiving all MSCMs unless they affirmatively indicate otherwise, either on a blanket basis, or by indicating to each MSCM sender that the consumer does not wish to receive further MSCMs.

The Attorneys General believe that the Section 14(b)(1) language must be interpreted to require consumers to opt-in, on a sender-by-sender basis, in order to receive MSCMs. This interpretation is consistent with the directive contained in Section 14(b) that the Commission shall promulgate rules "to protect consumers from unwanted mobile service commercial messages." It is also consistent with the actual language of the statute, which provides that the subscriber should be able to avoid receiving MSCMs without "express prior authorization." Section 14(b)(1). The statute requires the subscriber to give permission before an MSCM can be sent.

Congress and the Commission have adopted the opt-in approach in analogous situations. For example, the Telephone Consumer Protection Act bans the sending of commercial messages via facsimile without the prior express invitation or permission of the recipient<sup>1</sup>. In addition, the TCPA prohibits any calls using an automatic dialing system (except calls made for an emergency purpose) to any telephone number assigned to a service for which the called party is charged for the call (including cellular telephone service), without the prior express consent of the called party. In neither case is the consumer required to take any affirmative action to avoid the offensive communications. Congress and

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<sup>1</sup> 47 U.S.C. §§227(a)(4), (b)(1)(c).

the Commission concluded that fax advertisements and calls to cellular telephones were different from other live telemarketing calls because the recipient of such a transmission would incur real costs, and therefore they placed the burden on the party initiating the communication to obtain the consent of the recipient. Like unsolicited faxes and telemarketing calls to cellular telephones, all “spam” messages sent to wireless devices have a true monetary cost -- minutes debited from a bucket of minutes, the time it takes to view and delete a message, the tying up of one’s wireless device, and the use of battery power. In order to adequately protect consumers from these true monetary costs, the Commission, like it has done under the TCPA, should adopt an opt-in approach to MSCMs.<sup>2</sup>

The TCPA and the rules the Commission promulgated pursuant to it have been upheld by two circuit courts. *Missouri v. American Blast Fax, Inc.* 323 F.3d at 649 (8<sup>th</sup> Cir. 2003), *Destination Ventures, Ltd. v. FCC* 46 F.3d 54 (9 Cir. 1995). Both courts justified the TCPA’s prohibition on unsolicited faxes on two primary grounds: (1) unsolicited faxes shift the costs of advertising to the recipient, forcing it to incur paper and toner charges; and (2) incoming fax advertisements occupy the recipient’s telephone line and prevent the recipient from conducting legitimate business activities. For the reasons Congress and the courts have deemed it appropriate and constitutional to require express prior authorization before an unsolicited facsimile can be sent, so should the courts find it constitutional to require express prior authorization before an MSCM can be sent.

In fact, an additional justification exists that makes the case for adopting an opt-in approach for MSCMs even more compelling than the opt-in required in order to receive unsolicited faxes. Unlike the fax machine, wireless devices often are used as a security and safety device. Consumers rely on their wireless devices as a means to request assistance in an emergency or in less urgent cases, such as when their car breaks down. They use the devices to communicate with family members, to make sure plans are executed, children are safe, and late arrivals are announced with notice. Unwanted MSCMs use up battery power and interfere with consumers’ ability to use wireless devices in an emergency.

In paragraph 18, the NPRM states that “it is not clear that Congress necessarily sought to impose a flat prohibition against (MSCMs) in the first instance,” and that the consumer must take “affirmative action to bar (them).” The opt-out approach, however, is neither consistent with the legislation nor logistically workable. Such an approach is at variance with the legislative directive that provides that consumers must affirmatively authorize the sending of MSCMs before they can be sent. It would construe the consumer’s silence (a failure to agree to the receipt of MSCMs at the time mobile service is purchased) as an acceptance of them at a later time. Silence, however, does not constitute the “express prior authorization” required by the statute.<sup>3</sup>

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<sup>2</sup> The Commission noted in its recent rulemaking under the TCPA that because of the costs imposed on the recipient, even a “do-not-fax” list would “inappropriately place the burden on the recipient.” See *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 F.R. 44144, 168 (2003).

<sup>3</sup> The Commission has concluded in its unsolicited fax regulations, for example, that the consent required to send fax advertisements cannot be obtained through the use of a negative option because such an approach “would impose costs on facsimile recipients unless or until the recipient were able to ask that such transmissions be stopped.” See *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 F.R. 44144, 168.

Moreover, the opt-out method described in paragraph 22 of the NPRM, suggesting that consumers could affirmatively decline to receive MSCMs on a blanket basis at the time they subscribe to mobile service, is impractical. Under such an approach, it would be up to the mobile service seller to ask each consumer whether he or she consents to receiving MSCMs at the time of the original contract for services. There is already a dizzying array of details confronting consumers of mobile services, such as type of wireless device, type of wireless technology, price, coverage, roaming charges, long distance charges, number of minutes and when and for what they can be used, multiple add-on fees not included in the base price, and dozens of other contract terms and conditions. Adding yet another item to that list could worsen the confusion and may end up lost in the sea of other details.<sup>4</sup>

Contrary to the Commission's initial determination, the States contend that Congress did intend to flatly prohibit MSCMs unless the consumer first consents to receiving them. Without the express prior permission of the consumer, Section 14(b)(1) clearly states that the consumer can "avoid receiving" MSCMs.

## **II. All MSCMs Sent to Wireless Devices Should be Covered by The CAN SPAM Act.**

In paragraphs 9 through 17 of the NPRM, the Commission seeks comment on the scope of messages to be covered by Section 14 of the CAN SPAM Act. The Attorneys General believe that all unsolicited commercial e-mail messages sent to wireless devices, without regard to the technology used to send them, should be treated the same. Unsolicited commercial e-mail messages sent to wireless devices shift the same costs to the end user: dollars and/or minutes debited from a bucket of minutes, the time it takes to view and delete a message, the tying up of one's wireless device, and the use of battery power. These costs are incurred without regard to whether the message was initiated from a wireless device or from a computer, and without regard to whether "push" or "pull" technology is employed.

In paragraph 15 of the NPRM, the Commission suggests that text messages, or SMS, may not be covered by the Act's definition of MSCM, in that SMS messages are directed to a wireless telephone number without reference to an Internet domain. However, in paragraphs 6 and 15 of the NPRM, the Commission points out that it has determined that the TCPA's prohibition against using an automated dialer or prerecorded message to send certain voice calls and text calls to wireless numbers applies to SMS messages.

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The Commission further concluded that even an established business relationship between the solicitor and the recipient is not sufficient to evidence consent. *Id.* (reversing, effective January 1, 2005, the Commission's prior conclusion that an established business relationship provides the necessary consent).

<sup>4</sup> It is especially unlikely that consumers would have a meaningful opportunity to express their desire not to receive MSCMs when you consider that consumers usually sign up for mobile service with one of thousands of independent agents that work in authorized dealers, kiosks in the mall, or a counter in the grocery store. The States' experience based on consumer complaints is that such agents often fail to follow the policies established by the carriers and that the carriers fail to exercise sufficient control over such agents to ensure that proper procedures are followed.

The Attorneys General assume that, between the CAN SPAM Act and the TCPA, consumers are meant to be protected from unwanted SMS messages sent to their wireless telephone numbers. However, if the Commission interprets SMS messages between mobile devices to be outside of the reach of the CAN SPAM Act, and such messages are not completely covered by the TCPA, then the Attorneys General believe the CAN SPAM Act needs to be amended to cover this situation. Consumers should be able to avoid all unwanted commercial messages sent to their wireless devices, regardless of the technology employed to send the messages, and regardless of the type of device from which the message was initiated.

### **III. Express Prior Authorization Should Be Clear, Unequivocal, and Easily Revocable.**

In paragraphs 35 and 36 of the NPRM, the Commission seeks comment on the form and content of “express prior authorization,” including whether it should be required to be in writing, and how any such requirement could be met electronically.

The Attorneys General believe that express prior authorization should be defined as it is under the Federal Trade Commission’s Telemarketing Sales Rule<sup>5</sup> and the Commission’s recently amended Rules pertaining to unsolicited facsimile advertisements and telephone solicitations.<sup>6</sup> Specifically, express prior authorization must meet all of the following requirements: (1) it must be in writing; (2) it must be signed by the person granting the consent (with the proviso that the signing may include an electronic or digital form of signature as is provided for in the FTC Rules, 16 C.F. R. Section 310.4 (a)(7)(B)(i)(FN6)); and (3) it must evidence clearly the person’s express authorization to receive an MSCM at a specified address from a specified sender.

Additionally: (1) the consumer must not bear any cost (either in funds actually expended or in minutes charged against a wireless account) to receive a request for express prior authorization or to reply to such a request; (2) the request for express prior authorization should clearly explain what, in fact, will be authorized (i.e. the receipt of MSCMs from an identified sender on the consumer’s mobile wireless device) and the means by which the consumer can later revoke authorization; (3) the request for express prior authorization also should disclose clearly and conspicuously that, should he or she grant express prior authorization to receive MSCMs, the consumer will incur costs to receive the MSCMs, consistent with the agreement with his or her wireless provider; (4) the request for express prior authorization should appear alone (in other words, it must not be combined with any promotional offer or advertisement); and (5) the authorization itself should also be given apart from any other

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<sup>5</sup> 16 C.F.R. § 310 *et seq.* (effective December 31, 1995).

<sup>6</sup> 47 C.F.R. § 64.1200(a)(3)(i) (effective January 1, 2005); the Commission noted that, for purposes of its rules pertaining to telephone solicitations, the definition of telephone solicitation, 47 C.F.R. §64.1200(f)(9), does not include calls made with the prior express invitation or permission of the called party, and that such term shall be consistent with the Federal Trade Commission’s determination- “...that for purposes of the national do-not-call list such express permission must be evidenced only by a signed, written agreement between the consumer and the seller which states that the consumer agrees to be contacted by this seller, including the telephone number to which the calls may be placed.”, 68 F.R. 44144, 44148.

authorization or request for products or services.<sup>7</sup> There should be no ambiguity about either the sender's request or the consumer's authorization.

The Commission seeks comment, in paragraph 35, on whether the definition of "affirmative consent" would be suited to use in defining "express prior authorization." The Attorneys General strongly believe that the definition of "affirmative consent" falls short. The term as used at Section 3(1) of the CAN SPAM Act is designed to address a situation where a consumer first opts-out of receiving spam on a computer and then later changes his or her mind and gives "affirmative consent" to receiving it. The burden is primarily on the consumer to take action, presumably after informing him- or herself of the consequences. This is in contrast to the requirements under Section 14 of the Act, which places the burden on the sender to first get "express prior authorization" before sending an MSCM. The burden in the latter case is on the sender to clearly explain what is being sought and to obtain unequivocal permission from the recipient. By using different terms to describe the type of authorization which must be obtained in two different contexts, Congress also indicated that two different standards must adhere. "Affirmative consent," the simple requirement that a recipient "expressly consented to receive the message," (Section 3(1)(A)) is not the same as "express prior authorization" (Section 14 (b)(1)).

In addition to the fact that Congress chose two different terms to address two different situations, the Attorneys General are concerned that if the definition of "affirmative consent" is used, any sender which obtains permission from a consumer to send MSCMs could include a general disclosure that the consumer's MSM address could be shared with other senders, and then share the consumer's MSM address with any number of other senders, who then could send MSCMs to the consumer. The consumer may not want these other messages and may intend to grant permission only to the original sender. It is unfair and potentially deceptive to attempt to obtain consumers' agreement to receive MSCMs from an unspecified and potentially infinite number of senders, especially in light of the fact that each MSCM has a cost to the consumer. "Express prior authorization" must be required on a per sender basis in order to provide meaningful protection for consumers, consistent with the CAN SPAM Act.

Paragraph 37 of the NPRM asks for guidance in determining what method should be available to consumers to indicate their desire not to receive future MSCMs from a sender. Presumably this situation would arise where a consumer has already opted in to receiving the MSCMs and later changes his or her mind. While there are others who can opine more knowledgeably on the most efficient technical methods to use, the States believe that whatever method is used should be consistent with several governing principles: (1) it should be at no cost to the consumer; (2) it should be easily transmittable through a variety of media, including the Internet, the telephone system, or the U.S. Mail; and (3) it should be subject to the same action requirements as senders of computer-viewed

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<sup>7</sup> The Commission's rules concerning unauthorized changes of consumer' long distance carriers provide that authorization to switch carriers be verified by one of three methods. The rules provide that, for the letter of agency (LOA) method of verification, in addition to other enumerated requirements, the LOA shall be a separate (or easily separable) document containing only the authorization language and having the sole purpose of authorizing the carrier switch. The rules also state that the LOA shall not be combined on the same document with inducements of any kind. 47 C.F.R. § 64.1130.

commercial e-mail messages, as described in Section 5 of the CAN SPAM Act (i.e. cessation of e-mails, capability of receiving opt-out requests, etc.). Additionally the availability of the opt-out option and the means by which it can be exercised should be displayed prominently within the text of all MSCMs sent to the recipient, on the first screen of any message.

**IV. Senders Should be Able to Reasonably Determine that Their Messages are Being Sent to a Wireless Device.**

Principles of due process dictate that a sender of an MSCM must know that his or her electronic message will be displayed on a MSM subscriber's wireless device. In order for a court to hold a sender accountable for compliance with the law, the sender must have "notice" or "fair warning" that he or she is engaging in activity that is governed by statute or regulation. *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992). This is akin to the due process requirement that one must purposely direct his or her activities to a foreign state in order to be subject to that state's jurisdiction. Absent some notification that an e-mail message is directed to a wireless device, a sender might easily assume that the message will be displayed on a computer, and therefore be subject to the non-MSCM requirements of the CAN SPAM Act. Accordingly, it is extremely important that the Commission's Rules create a method by which notification is clearly made.

Among the options proposed in the NPRM for giving notification, there is one that stands out as the most logical and easiest to implement. At paragraph 24 the Commission proposes that MSM subscriber addresses be distinguishable from other e-mail addresses. This could be done through a mechanism whereby wireless e-mail address domains were required to contain, by FCC Rule, a specific numerical or other designation. In the alternative, the FCC could designate specific domain names as belonging to wireless devices. With either approach, the Attorneys General suggest that the FCC could keep an updated and publicly-posted list of all wireless domain names currently in use (or specific designations that signify the e-mail address belongs to a wireless device) so that MSCM senders could consult the list to avoid sending MSCMs to addresses with those domain names or specific designations. This would allow would-be senders to screen out particular domains or designations from their e-mail lists.

**V. Commercial Mobile Service (CMRS) Providers Should Not Be Exempt from Prohibition Against Sending MSCMs Without First Obtaining Express Prior Authorization.**

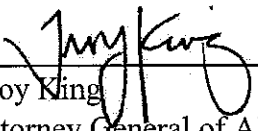
CMRS providers should not be exempt from the rules requiring express prior authorization. The CAN SPAM Act already exempts transactional and relationship messages, presumably allowing CMRS providers to communicate with their customers about service and warranty issues. The Attorneys General know of no justification for a further exemption to be granted to CMRS providers. If a CMRS provider wants to send an MSCM to a consumer that is not a transactional or relationship message and the consumer provides his or her express prior authorization to that CMRS provider, then the CMRS provider can send messages to that consumer's wireless device unless and until the consumer requests not to receive further messages.


Further, creating a flat exemption for CMRS providers without sufficient justification could make the statute susceptible to a constitutional challenge. While the States do not contend that such an exemption on its own would render the statute unconstitutional, the more exemptions the statute has, the more susceptible it is to a challenge.<sup>8</sup>

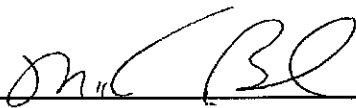
## VI. Conclusion

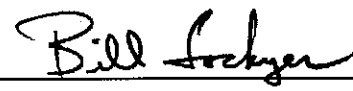
In conclusion, the States urge the Commission to: (1) require an affirmative opt-in, on a sender-by-sender basis, before an MSCM can be sent; (2) construe the provisions of the statute to cover all wireless technologies, regardless of whether they are "push" or "pull"; (3) provide for meaningful disclosures in the context of a request for express prior authorization; (4) require clear authorization before consumers opt-in to receiving MSCMs; (5) assure that senders can know their messages will be displayed on wireless devices; and (6) decline to exempt CMRS providers from the provisions of the Rules. The States thank the Commission for considering their views.


Sincerely,

  
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<sup>8</sup> See e.g., *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 190, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (finding the statute unconstitutional because it was "pierced by exemptions and inconsistencies.").





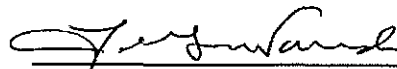
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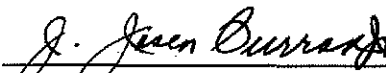
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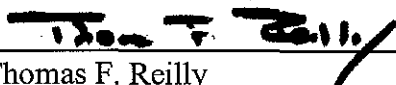
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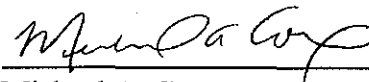
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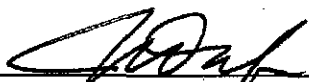
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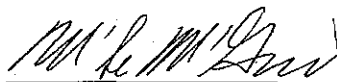
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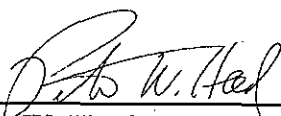
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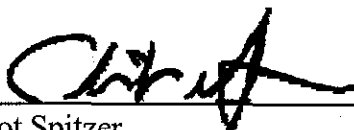
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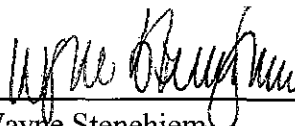
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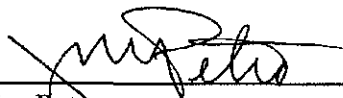
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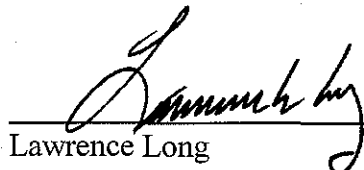
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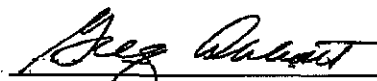
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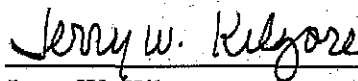
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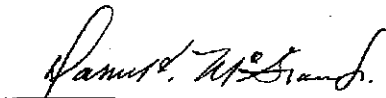
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